

**Statement of Rep. Henry A. Waxman  
Regarding Markup of Health Information Technology and  
Privacy Legislation  
House Committee on Energy and Commerce  
July 23, 2008**

Mr. Chairman, I support the amendment in the nature of the substitute before us today to promote health information technology. This measure reflects months of hard work on the part of the Chairman, Ranking Member, Mr. Pallone, Mr. Deal, a very focused and dedicated Committee staff, and many other interested parties.

If developed and implemented thoughtfully, health information technology has great potential to improve the efficiency and quality of care in our health care system. Any effective electronic health records system, however, must include appropriate privacy and security protections. The bill as introduced included a number of important privacy and security protections, and I am pleased that additional protections that I and others advocated were added during the discussions that led to today's amendment in the nature of a substitute.

One of the concerns that I raised during the development of this measure is the Administration's dismal record of enforcing

federal health privacy protections. Despite receiving over 30,000 complaints, the Administration has not imposed a single civil penalty under the privacy.

Last week HHS announced it had reached a “resolution agreement” with a hospital system to address incidents that had compromised the health information of thousands of patients. But this was the first action of this kind by HHS in the half decade the privacy rule has been in effect.

According to privacy experts, over the past five years, the Administration has been interpreting HIPAA in such a way that allows covered entities to ignore the privacy rule requirements and not be subject to any fines, as long as they agree to bring themselves into compliance once they are caught violating the rule.

To help address the Administration’s lax approach to enforcing the privacy rule, at the Subcommittee markup I proposed an amendment clarifying that State Attorneys General have authority to conduct civil enforcement actions regarding the privacy rule should they so choose. In negotiations over the bill, however, some members raised concerns about the State AGs

proposal, and an alternative approach was developed and included in the amendment in the nature of the substitute.

The new language makes clear that the Secretary shall impose a civil penalty if the violation is due to willful neglect, and must formally investigate complaints of noncompliance where a preliminary investigation of a complaint indicates a violation was due to willful neglect. This language makes clear that the Secretary can no longer pursue a “one bite at the apple” approach concerning those who willfully violate the privacy rule.

The new language also addresses a second federal enforcement issue. Currently, the Secretary cannot impose a civil penalty if the violation is an offense “punishable” under HIPAA’s criminal penalty provisions. Questions have been raised regarding whether the Secretary could be interpreting this language to mean he is prohibited from pursuing a civil penalty where the violation qualifies for criminal punishment even when the Department of Justice never pursues criminal punishment. The new language makes clear that the Secretary can impose civil penalties unless the violation is actually punished criminally.

I believe that these new provisions will have a positive impact on federal enforcement of health information privacy requirements and I am pleased that members on both sides of the aisle have worked to address enforcement concerns that I raised.

Another issue I have raised is the need to preserve the psychotherapist/patient privilege, which is an important component of ensuring patient confidence and trust in the provision of treatment. I am pleased that the amendment in the nature of the substitute includes language to make clear that the bill does not interfere with the psychotherapist/patient privilege.

The amendment in the nature of a substitute also includes a number of other privacy and security protections, including provisions to require breach notification; to encourage entities that maintain health information to share the least amount of data necessary with other entities; and to extend privacy requirements to certain entities that handle health information but are not currently covered by the federal health privacy rule.

Because of these provisions, I believe the bill reflects a step forward in the effort to forge health information technology policy that will benefit American consumers, and I support this measure.

At the same time, I want to emphasize that Congress should vigilantly monitor the development and implementation of health information technology to ensure effective federal policy on health information privacy and security.

I commend my colleagues for their efforts on this measure.